U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 September 2007

BALCA No.: **2007-INA-00026**
ETA Case No.: P-05136-16036

In the Matter of:

JONATHAN APPAREL, INC.,
Employer,

on behalf of

FLORENCIA RODRIGUEZ-MOYAO,
Alien.

Certifying Officers: Stephen W. Stefanko
Barbara Shelly[1]
Philadelphia Backlog Elimination Center

Appearances: Victor M. Pizarro, Esquire
Long Island City, New York
For the Employer and the Alien

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section

[1] Stephen Stefanko issued the May 22, 2006 Notice of Findings. Barbara Shelly issued the February 5, 2007 Final Determination and the May 2, 2007 Reconsideration Denial, and forwarded the Appeal File to the Board.

212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[2] We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

BACKGROUND

The Employer submitted this application for permanent alien labor certification for the position of Embroidery Machine Operator. (AF 14). The CO issued a Notice of Findings ("NOF") on May 22, 2006, stating the intent to deny the application based on two grounds, one of which was later successfully rebutted. The ground still at issue is that the experience requirements for the job were unduly restrictive. (AF 11). In the Employer's ETA Form 750, the Employer indicated that it was requiring two years of experience in order to qualify for the job opportunity. According to the Dictionary of Occupational Titles (4th Ed., Rev. 1991) ("DOT"), the occupation of "Embroidery-Machine Operator" has a Specific Vocational Preparation (SVP) Level of 4. This level requires experience of over 3 months up to and including 6 months. Thus, the Employer's requirement of two years of experience goes beyond what is stated in the DOT, making the requirement unduly restrictive and in violation of 20 C.F.R. § 656.21(b)(2)(i)(B). The CO advised the Employer that it could resolve this deficiency either by submitting evidence that the requirement arises from a business necessity, or by amending its application for labor certification and reducing its experience requirements to the DOT standard. (AF 12).

The Employer submitted a rebuttal to the CO's NOF on June 26, 2006. The Employer argued that it was converting an experienced employee to Embroidery Machine Operator rather than having independent contractors do the work, which

[2] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

represented a major change in its business operations. (AF 2). The Employer also stated that two years of experience are essential because the Employer does not have time for training a new employee. (AF 1).

On February 5, 2007, the CO issued a Final Determination denying the application. The CO found that the Employer "failed to rebut Finding #1: Unduly Restrictive Job Requirements. You [the Employer] did not provide a business necessity nor did you amend the application to the DOT standard." (AF 4).

On February 19, 2007, the Employer submitted a "rebuttal" to the CO's findings in the Final Determination. The Employer stated that it had made amendments to the ETA Form 750 and lowered the experience needed for the job to meet DOT standards. (AF 5). The CO treated this submission as a request for reconsideration.

By a letter dated May 2, 2007, the CO denied the Employer's request for reconsideration, stating that "[m]otions for reconsiderations will be entertained only with respect to issues which could not have been addressed in the rebuttal" and that "the present motion does not raise such matters." (AF 2). The letter also advised the Employer that it could request a review of the denial. On May 16, 2007 the Employer submitted a request for review.

In response to the Employer's request for review, the CO forwarded the matter to this Board on May 25, 2007. The Board issued a Notice of Docketing on June 5, 2007. No briefs or statements of position were received.

DISCUSSION

The CO informed the Employer that it had the option to rebut the NOF by proving that the experience requirement arose from a business necessity. Upon consideration of the evidence before the CO, we find that the Employer failed to show that the job requirement was a business necessity for the Employer. The regulation specifying the

need to establish business necessity for an unduly restrictive job requirement is found at 20 C.F.R. § 656.21(b)(2), which states:

> (2) The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:
> (i) The job opportunity's requirements, unless adequately documented as arising from business necessity:
> (A) Shall be those normally required for the job in the United States;
> (B) Shall be those defined for the job in the Dictionary of Occupational Titles (D.O.T.) including those for subclasses of jobs;
> (C) Shall not include requirements for a language other than English.

The issue of what constitutes business necessity was addressed by this Board in Information Industries, Inc., 1988-INA-82 (Feb. 9, 1989)(en banc). In this case, the Board established a two-prong test to determine the business necessity of an employer:

> We hold that, to establish business necessity under §656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer.

The evidence requested by the CO in the NOF in the instant case reflects this standard.

In response to the NOF, the Employer submitted a rebuttal which stated: "The two years of experience is essential to the employer because the employer has very little time to train others to do the work required by the company." (AF 6). However, the Employer failed to show why two years of experience are needed for the position and why an applicant with three to six months experience could not reasonably perform the job duties. The Employer also argued that:

> as in all service type of companys [sic] necessity has required us [the Employer] to create different approaches to meet the competition. In order to meet the competitive nature of our business we decided to convert an experience [sic] employee to an Embroidery Machine Operator than have the work done independently on a piece meal basis by other independent contractors. This represented a major change in our business operations.

(AF 6-7). The Employer, though, did not illustrate how its business operations underwent a major change. The Employer argued that it must keep up with competition and does not wish to use contractors; however, the Employer did not explain how its business operated previously and how it operates differently now.

Furthermore, the Employer did not submit any documentation to verify its statements. According to the CO's requests in the NOF, "[r]ebuttal evidence must include documentary evidence," such as experience with prior employees, organizational charts and payroll records. (AF 12). See Gencorp., 1987-INA-659 (Jan. 13, 1989)(en banc) (if the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it). Mere assertions by the Employer do not suffice as evidence; it is the Employer's burden to prove business necessity. See Analyst International Corp., 1995-INA-131 (May 28, 1996).

The Employer was also informed in the NOF that it could rebut the finding of an unduly restrictive experience requirement by amending the ETA Form 750 to reduce the requirements to the DOT standard. The Employer submitted an amended form with his request for reconsideration. However, an employer's offer to change a restrictive requirement after the Final Determination has been issued is untimely. See, e.g., Colorgraphics Corp., 1987-INA-600 (Nov. 20, 1987)(en banc).

The amended form the Employer submitted with his request for reconsideration is also considered new evidence, which is beyond the authority of this Board to consider. The regulation at 20 C.F.R. § 656.27(c), concerning review on the record by the Board, states that the Board "shall review the denial of labor certification on the basis of the record upon which the denial of labor certification was made." The regulation also states that the Board will take into account "the request for review, and any Statements of Position or legal briefs submitted." However, 20 C.F.R. §656.26(b)(4) states that the "request for review, statements briefs and other submissions of the parties […] shall contain only legal argument and only such evidence that was within the record upon

which the denial of labor certification was based."[3] These regulations exclude the possibility of presenting new evidence before the Board; we will only examine that evidence on which the CO reviewed and based the denial. See Import S.H.K. Enterprises, Inc., 1988-INA-52 (Feb. 21, 1989)(en banc). Thus, the amended form that the Employer submitted with his request for reconsideration cannot be taken into consideration by this Board.

In sum, the Employer did not prove that its experience requirement, which exceeded the standards set by the DOT, arose out of a business necessity. Accordingly, we find that the CO properly denied certification.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk

[3] See also Harry Tancredi, 1988-INA-441 (Dec. 1, 1988)(en banc)(evidence submitted with motions for reconsideration will only be considered if the employer did not have a previous opportunity to argue its position or present evidence).

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Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.